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In The

Supreme Court of the United States

October Term, 1989

MARGUERITE L. JACKSON, ET AL.,

Petitioners,

v.

GEORGE E. RUSSELL,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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Petitioners hereby file their Reply in Support of their request that a Writ of Certiorari issue to review the judgment and Opinion of the Court of Appeals of Indiana entered in the above-entitled proceeding on January 17, 1989.

I. INTRODUCTION.

The present case presents an excellent opportunity for this Court to address an important and far-reaching issue of constitutional law, namely, the proper scope of the full faith and credit clause of the Constitution as applied to a forum's refusal to recognize community property rights established in a sister state. To discourage the granting of certiorari to determine this issue, Russell tries to create three false illusions.

1. The first illusion is that petitioner Marguerite L. Jackson ("Marguerite"), who Russell intentionally never named in the underlying state court litigation, is somehow acting improperly in seeking to protect her community property from execution by Russell. This proposition is so facially defective as to require little response. The trial court (as well as the Court of Appeals) acknowledged the valid business reasons underlying the transactions in question, *see* Findings, App. D at A 18-19; *Jackson v. Russell*, 533 N.E.2d 153, 155 (Ind. App. 1989), App. A at A-6 – and held the transfers improper only because they impaired Russell's efforts to execute on property believed to be owned solely by judgment debtor, C. W. Jackson. If, as demonstrated below, the property in question was immune from execution because it belonged to non-judgment debtor Marguerite, Russell has no legitimate complaint arising out of his failure to name Marguerite in the original lawsuit.

2. The second false illusion is that the Court of Appeals applied Arizona law in deciding in favor of Russell. As shown in Section II below, this argument is directly contrary to the Court of Appeals' Opinion, and is an unconvincing and misleading effort to trivialize the constitutional violation perpetrated in this case.

3. The third false illusion is that this case is governed by *Allstate*'s[1] "significant contacts" test because it involves a routine "choice of law" issue. As shown in Section III below, this case precisely poses the question of whether a party's established community property rights can be abrogated because a forum state happens to have some contact with the controversy in question. For the reasons stated in Section III below, the full faith and credit clause requires more than "significant contacts" for a forum to extinguish established community property rights.

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[1] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, *reh'g denied*, 450 U.S. 971 (1981).

II. THE INDIANA COURT OF APPEALS VIOLATED MARGUERITE'S CONSTITUTIONAL RIGHTS BY IGNORING ARIZONA COMMUNITY PROPERTY LAW.

It is truly remarkable how Russell recasts the Court of Appeals' Opinion, and his prior arguments, in his attempt to challenge the Petition. Be that as it may, the "best evidence" of what was decided by the Court of Appeals is the actual language of the Opinion. Contrary to Russell's present (and new) argument, it is patently untrue that the Court of Appeals factually ruled that the partnership and stock interests were community property under Arizona law – or that the Court of Appeals simply misapplied Arizona law on this issue. In this regard it is important to understand the context in which the Opinion was rendered. This context is well-illustrated by Russell's own second argument (and the one he has clung to consistently), in which he argues that Indiana's "significant contacts" with this case mandate the application of Indiana law. Russell has steadfastly maintained throughout this case that Arizona law must bow to Indiana statutory law with respect to his efforts to execute on the stock and partnership interests in question. And this is precisely what the Court of Appeals ruled in this case. After describing the transfers in question, the Court of Appeals dealt with the issue of which law was applicable to the case. *Jackson v. Russell*, 533 N.E.2d at 155-57, App. A at A 7-9. As a simple reading of these pages of the Opinion reveals, the Court of Appeals specifically ruled that the Indiana partnership "charging statute" and the "stock execution" statute authorized the execution on the property in question because the partnership and corporations were located in Indiana.[2]

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[2] As demonstrated in the Petition, Section D, pp. 22-24, this reliance on the partnership charging and the stock execution statutes was legally and constitutionally erroneous. These

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At the outset of its discussion of the conflicts issue, the Court of Appeals signals its intention to apply Indiana law by citing *Clark v. Williard*, 294 U.S. 211 (1935) ("*Clark v. Williard* II"), for the proposition that "every state has jurisdiction to determine for itself the liability of property within its jurisdictional limits to seizure and sale under the process of its courts." *Jackson v. Russell*, 533 N.E.2d at 155, App. A at A-7. The Court of Appeals then cites the partnership charging statute as the "applicable" statute. In applying the partnership charging statute, the Court of Appeals then gives short shrift to Arizona community property law:

> Jackson's arguments about community property notwithstanding, the overriding facts are that Jackson is a partner in an Indiana partnership whose assets are located in Indiana. I.C. 23-4-1-28 speaks directly and without equivocation to the fact situation present in this appeal.

Id. at 156, App. A at A-7.

Finally, the Court of Appeals summarizes its application of "Indiana law" in this case:

> In sum, we are of the opinion that Jackson has a properly rendered judgment against him and

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statutes simply provide the procedural mechanism for a creditor to execute on the partnership and stock interests of a judgment debtor. They do not – and constitutionally cannot – authorize a judgment creditor to execute on property owned by someone who is *not* a judgment debtor. Were Marguerite's community property rights recognized by the Indiana courts, the execution would not be appropriate because Marguerite had an indivisible community property interest in all of the stock and partnership interests in question. *See* Petition, Section B, pp. 16-17. However, as reflected in the Opinion, the Court of Appeals simply ignored Marguerite's community property rights established by the law of her domicile – Arizona.

> that *Indiana* law makes Jackson's partnership interest in Jackson Plastics subject to execution in satisfying that judgment.

Id. (emphasis added).

Exactly the same approach was followed with respect to the stock interests in question. The trial court had ruled that Arizona community property law precluded execution on these interests. The Court of Appeals, however, ignored Arizona law and ruled that the stock execution statute (I.C. 34-1-36-5) authorized the execution in question:

> We are of the opinion that I.C. 34-1-36-5 controls under the facts before us.
>
> * * *
>
> It is our belief that, by reason of our determination of the prior issue, Jackson's shares of that stock are also subject to execution by the judgment creditor pursuant to I.C. 34-1-36-5.

Id., App. A at A-9.

In light of the foregoing, it is a specious rewriting of history for Russell to argue now that the Court of Appeals was factually finding that the partnership and stock interests were not "intended" to be held as community property under Arizona law. It is equally specious for Russell to intimate that the Court of Appeals may have simply misapplied Arizona community property law on this issue. This post-facto sophistry is highlighted by Russell's citation to *National Industries, Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258 (9th Cir. 1982). There, the Ninth Circuit discussed the powerful Arizona presumption in favor of community property ownership,[3] but

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[3] Indeed, in light of the strong community property presumption, i.e., "[t]his presumption can be rebutted only by 'strong', 'satisfactory', 'convincing', 'clear and cogent' or 'nearly conclusive' evidence," 677 F.2d at 1266 (quoting *Porter v. Porter*, 67 Ariz. 273, 195 P.2d 132 (1948)), the court recognized

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found that the presumption was overcome by the specific evidence of the spouses' intent in that case. *National Industries* illustrates the appropriate decision-making process for courts to apply in determining community property rights under Arizona law. A fair reading of the Opinion clearly demonstrates that the Court of Appeals did *not* follow such process in this case (either correctly or incorrectly), but instead eschewed Arizona law in favor of its preference for Indiana law.[4]

In short, the Court of Appeals never applied (or even misapplied) Arizona law, but instead refused to consider Marguerite's community property rights in order to benefit an Indiana judgment creditor. If this Court agrees (by reason of argument in Section III below) that Indiana was required to recognize Arizona community property rights in this case, this matter must be remanded to the Indiana courts for application of Arizona law to the facts of this case.

III. THE "SIGNIFICANT CONTACTS" TEST DOES NOT GOVERN THE PROPERTY RIGHTS ISSUE POSED BY THIS CASE.

At least Russell's argument in Section 2 of his Brief is consistent with his position throughout this litigation – which is that Indiana's contacts with this case bar the

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that the issuance of a single joint tenancy deed that purports to create a joint tenancy estate does not so operate. 677 F.2d at 1267.

[4] As an introductory comment to his fallacious argument that Arizona law was applied by the Court of Appeals, Russell notes that the federal issue involved must be raised and decided. As demonstrated in the Petition, pp. 3-7, the "full faith and credit" and "due process" federal issues were raised by petitioners on a number of occasions, and the Court of Appeals' refusal to apply Arizona law was a clear decision against petitioners on these issues.

application of Arizona community property law. In constitutional terms, Russell claims that the full faith and credit clause (like the due process clause) permits a forum state to ignore property rights established under a sister state's law so long as the forum has "significant contacts" with the controversy. This starkly poses the basic certiorari issue in this case: should the "significant contacts" test permit the abrogation of community property rights established by a sister state? To isolate this issue analytically, consider the following factual scenario which is simpler than (but analytically indistinguishable from) the present case.

Let us first assume that an Indiana creditor (like Russell) obtains a judgment against a husband, but intentionally refrains from joining the spouse (like Marguerite) in the Indiana litigation.

Let us next assume that the judgment debtor and spouse are residents of a community property state (like Arizona) who drive their only automobile (which they own as community property) through Indiana (a non-community property state) – and that the Creditor attempts to execute on such car pursuant to the general execution statutes in Indiana.

Let us further assume that the community property state exempts from execution one car per judgment debtor, but Indiana has no such exemption statute.

Finally, let us assume that the law of the community property state (as does Arizona) confers an indivisible ownership right in each spouse in the car in question.

The first issue posed by this hypothetical is whether the Arizona or Indiana exemption law applies to the automobile while in Indiana. We agree that Indiana law would apply to that issue as this is a classic "choice of law" problem which is properly governed by the *Allstate* "significant contacts" standard. Indeed, this is a proper application and explanation of the general comment in *Clark v. Williard* II (relied upon by the Court of Appeals) that "every state has jurisdiction to determine for itself

the liability of property within its territorial limits to seizure and sale under the process of its courts." *Jackson v. Russell*, 533 N.E.2d at 155, App. A at A-7.

But this certainly does not end the inquiry. There remains the critical question of whether the Indiana courts can authorize execution on the automobile in derogation of the spouse's community property ownership interest in the automobile. Russell would argue that such abrogating power exists because Indiana is "significantly connected" with the matter by virtue of the creditor's Indiana judgment and the location of the automobile within the state of Indiana. The full faith and credit clause, however, requires the rejection of this argument when established property rights are at issue. Because Arizona law establishes an indivisible property right of the spouse in this community-owned automobile, this "property right" cannot be extinguished under the guise of a simple "choice of law" by a forum state.

This illustration (like our case) poses the issue of whether the full faith and credit clause is to be accorded a reach independent of (and broader than) the due process clause. As noted by Justice Stevens (in his concurrence in *Allstate*) and by commentators, the full faith and credit clause is historically and analytically distinct from the due process clause. *See* Petition, Section A, pp. 9-11. Instead of just negatively forbidding the application of a forum's law where there is insufficient contact with the state, the full faith and credit clause affirmatively mandates the application of a given state's law in particular circumstances. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1590 (1978); *see* Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. Cal. L. Rev. 1299, 1300, 1311 (1987). The application of the community property law of the spouse's domicile is mandated under this concept where, as in our example and our case, the issue being decided is *who owns* the property in question. In other words, if the community property law of the

marital domicile establishes an indivisible property interest in personal property in favor of the wife, the forum cannot ignore or destroy such property right to benefit a judgment creditor of the husband alone.

Russell's arguments notwithstanding, the *Clark v. Williard* cases support the foregoing analysis. In *Clark v. Williard*, 292 U.S. 112 (1934) ("*Clark v. Williard* I"), the issue was the nature of the ownership or "title" of the liquidator to the personal property in question. On this "ownership" issue, this Court stated that the law of the domicile of the owner (i.e., Iowa) must prevail pursuant to the full faith and credit clause of the constitution notwithstanding the location of the property within Montana.[5]

In *Clark v. Williard* II, this Court simply held (analogously to the exemption issue in our hypothetical) that a state can set general rules of execution on property and did not have to afford a liquidator any greater rights than the original corporation to whose rights the liquidator succeeded.[6]

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[5] Russell's attempt to characterize *Clark v. Williard* I as a situation in which the Montana court simply misinterpreted Iowa's statutes and court decrees is far too narrow a reading. The Montana court had specifically concluded that no constitutional provision required it to recognize the title of the receiver to the detriment of its own citizens, 292 U.S. at 121, and this Court held that the full faith and credit clause *did* so require. Indeed, this "misinterpretation of state law" argument by Russell is inconsistent with Russell's position that an error in interpreting another state's law is not a violation of full faith and credit.

[6] Russell's reliance on *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1877), is equally unavailing. As did *Clark v. Williard* II, this case simply holds that the forum state has the right to invoke its collection procedures within its borders against property owned by the judgment debtor and located within the forum.

In any event, if there is any confusion as to the proper meaning of the 55-year-old *Clark v. Williard* cases, the present case is an excellent opportunity for the Court to resolve the confusion and to speak authoritatively on the application of full faith and credit to community property rights. Moreover, this case affords the Court an opportunity to apply the full faith and credit clause in a manner which does not result in community property residents (there are eight community property states) acting at their own peril by owning or bringing community property to a non-community property state.

IV. CONCLUSION.

For the reasons stated in this Reply and the Petition, the reversal of the Opinion is necessary to advise the courts of all states that established state law property rights are entitled to protection wherever a citizen travels in these United States. Accordingly, the Petition for Certiorari should be granted.

Respectfully submitted,

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